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No. 77-799

In the

Supreme Court of the United States

OCTOBER TERM, 1977

TONY AQUILINO, et al.,

Petitioners,

vs.

McGRAW-EDISON COMPANY, a Corporation, and TRUSTEES OF THE McGRAW-EDISON COMPANY PROFIT SHARING TRUST,

Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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For the reasons set forth in this joint brief in opposition, respondents pray that the petition for a writ of certiorari in this case be denied.

OPINIONS BELOW

The opinion and judgment order of Chief (now Senior) Judge Sorg of the United States District Court for the Western District of Pennsylvania granting summary judgment to defendants McGraw-Edison Company and the Trustees of the McGraw-Edison Company Profit Sharing Trust are printed in Appendix A to the Petition for Writ of Certiorari. The opinion of the District Court is not officially reported.

The judgment order of a unanimous panel of the United States Court of Appeals for the Third Circuit affirming the judgment of the District Court is printed in Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

This case is within federal court subject matter jurisdiction under Labor Management Relations Act §301(a), 29 U.S.C. §185(a)(1970), which empowers federal courts to hear "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ."

STATUTES INVOLVED

This action involves National Labor Relations Act §8 (a)(5), 29 U.S.C. §158(a)(5), which provides as follows:

> "It shall be an unfair labor practice for an employer —
>
> • • •
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

STATEMENT OF THE CASE

The opinion of the District Court for the Western District of Pennsylvania accurately sets forth the facts of the case, many of which were misstated in the petition. The District Court's statement of facts reads in relevant part as follows:

> "In this action plaintiff-employees of the McGraw-Edison Company seek distribution of their interests under the McGraw-Edison Profit Sharing Plan, a contributory profit-sharing plan established by the defendant McGraw-Edison Company (the Company) and administered by the defendant Trustees of the McGraw-Edison Profit Sharing Trust (the Trustees).
> . . .

Each participant's interest in the McGraw-Edison Profit Sharing Plan was represented by two trust accounts, a stock account, consisting of shares of the common stock of the Company purchased by the Trustees, and a general account, consisting of a proportionate share of the other assets held by the Trustees. It was expressly provided that shares of Company stock would be purchased by the Trustees whenever feasible.

Normal distribution of accounts was governed by sections 7 and 8 of the profit sharing plan. A participating employee would receive payment in full (the mode of payment, i.e., lump-sum cash, transfer of stock, purchase of annuity, etc., was left to the Trustees' discretion) upon death, disability retirement, or retirement at age 62. A participant employee who for any other reason left employment with the Company prior to attaining age 62 was entitled to the aggregate of his contributions plus interest and if he had been continuously employed by the Company for five years or more a scheduled percentage of the Company's contributions. Distribution would also occur, under article VIII of the trust, upon certain 'terminations' of the profit sharing plan.

The Company retained the right to amend the profit sharing plan in section 10 and the trust in article VII, except that the Company could not receive any repayment from the trust and the moneys could only be spent for the benefit of employees. It was also a condition of the Company's right to amend that the value of each participant's account would be the same or greater than that to which he would be entitled were he to terminate his employment on the date of amendment.

Plaintiffs, who number over 500 in this action, were members of locals 4561, 3968 and 6449 of the United Steelworkers of America and were employed by the Power Systems Division, Canonsburg, Pennsylvania Plant, of the Company under collective bar-

gaining agreements which provided that the terms of the profit sharing plan be extended to them. In October of 1973, the said collective bargaining agreements expired and the members of locals 4561, 3968 and 6449 went on strike. As a result of the ensuing collective bargaining, it was agreed, inter alia, that a fixed-benefit pension plan would replace the profit sharing plan. The collective bargaining agreement was ratified in February of 1974 by a majority of the members of locals 4561, 3968 and 6449.

The newly negotiated pension plan entitles employees or their beneficiaries to a fixed monthly payment in an amount determined by multiplying the employee's number of years of service by $8.00. Certain employees (including all of the plaintiffs) were also given the right to have their pension benefits calculated on the basis of an 'adjusted profit sharing account' with respect to years of service accrued prior to February, 1974. It is undisputed that by reason of the valuation formula applied in crediting employees for their past services, the value of the various plaintiffs' pension rights was measurably greater as of the date of the 1974 agreement than the value of their account rights under the profit sharing plan. In return, all participating employees were to be removed from the profit sharing plan, and the plan funds representing past employer contributions on behalf of these employees were to be used to provide the initial funding for the pension plan. The portion of employees' accounts attributable to their own contributions were to be held in trust separately for later distribution to them with interest. Additional funding for the new pension plan was to be provided by the Company as needed.

The profit sharing plan and trust agreements did not expressly reserve to the Company and the locals the right to modify terms through collective bargaining, nor did they provide for the transfer of profit sharing funds out of the trust. Nevertheless,

pursuant to and shortly after the collective bargaining agreement of February 10, 1974, the Company ceased profit sharing contributions on behalf of members of locals 4561, 3968 and 6449. In December, 1974, the Company amended the profit sharing plan to formally remove the members of those locals from the profit sharing plan. The amendment also directed the trustees to segregate the trust funds allocatable to these employees' accounts, which the Trustees have done, pending disposition of this action.

The essence of the plaintiffs' complaint is that their right to the trust accounts under the profit sharing plan were vested and could not be affected by the 1974 collective bargaining agreement and ratification. Plaintiffs also contend that, their interests in the profit sharing plan and trust having been 'terminated,' a distribution of their relative interests is necessary. In response, both the Company and the Trustees contend that the plaintiffs are bound by the 1974 collective bargaining agreement and that the profit sharing plan and trust were not 'terminated' ". (Footnote omitted).

ARGUMENT

The petition for a writ of certiorari suggests no issues in this case which warrant review for any of the reasons set forth in Rule 19 of the Supreme Court Rules. A writ of certiorari should not issue in this case, particularly in the light of the recent denial of a petition for a writ of certiorari presenting the same questions as this case in *Dwyer* v. *Climatrol Industries, Inc.*, 403 F. Supp. 683 (E.D. Wisc. 1975), *aff'd.* 544 F.2d 307 (7th Cir. 1976), *cert. den.* 97 S.Ct. 1553 (1977). In *Dwyer,* the questions presented to this Court were:

> "(1) Did plaintiff employees have vested property interest in pension plan agreement with company that may not be terminated without their consent?
>
> "(2) Are company and union estopped from terminating pension benefits?
>
> "3) Has union breached its duty of fair representation by agreeing to closedown agreement?" (45 U.S.L.W. 3551.)

In an attempt to avoid the obvious identity of the issues in *Dwyer* and in this case, petitioners have repeatedly asserted that retirement benefits for the petitioners were never the subject of collective bargaining between the union to which the petitioners belong and McGraw-Edison. That factual assertion by the petitioners is simply not correct and is contrary to the record below. The McGraw-Edison Company Profit Sharing Plan had been a subject of collective bargaining between the company and the local unions of which petitioners are members for many years prior to the change in benefits which

is the subject of this lawsuit. The defendants submitted to the trial court and included in the printed appellate record a collective bargaining agreement of December 14, 1954 between McGraw-Edison and the United Steelworkers of America on behalf of Local Union No. 4561 and a collective bargaining agreement of December 5, 1956 between McGraw-Edison and the United Steelworkers of America on behalf of Local Union No. 3968, both of which agreements provided for coverage of the members of the petitioners' local unions under the Profit Sharing Plan. The relevant paragraphs of those agreements are paragraph 27 of the Local Union No. 4561 agreement of December 14, 1954 and paragraphs 104-106 of the Local Union No. 3968 agreement of December 5, 1956. The full text of those collective bargaining agreements is printed in Respondents' Appendix submitted with this Joint Brief In Opposition. Given the uncontested documentary evidence that the petitioners' retirement benefits had been the subject of collective bargaining for many years, the District Court was entirely correct in its factual findings and legal conclusions. The distinction between this case and *Dwyer* asserted at pages 9 and 10 of the petition is specious.

Petitioners cite *Elgin J. & E. Railway Co.* v. *Burley,* 325 U.S. 711 (1945), as grounds for issuing a writ of certiorari in this case. The *Elgin* case stands for the principle that certain rights of employees cannot be adversely affected by collective bargaining agreements, but are enforceable by employees through the grievance procedure established under collective bargaining agreements. The District Court fully recognized the principle established by the *Elgin* case, but held that no protected rights were infringed in this instance. In fact, the District Court found that "the value of the various plaintiffs' pension

rights was measurably greater as of the date of the 1974 agreement than the value of their account rights under the profit sharing plan." (Petition, Appendix A, p. 16.) Based on this finding, the District Court concluded that the value of respondents' interests in the profit-sharing plan was "more than adequately preserved" and that the "amendment to the profit-sharing plan adopted in accordance with the collective bargaining agreement was also within the authority reserved to the Company under the terms of the profit-sharing plan itself." (Petition, Appendix A, p. 20.)

Petitioners imply that questions of interpretation of certain federal statutes, raised for the first time before this Court, provide a basis for issuing a writ of certiorari in this case. Petitioners appear to suggest, indirectly and without specific citation or verbatim reproduction, that the Employee Retirement Income Security Act of 1974 ("ERISA") may apply to the facts to which the parties stipulated. No such contention was made to the courts below, nor was there any basis for so contending. The matters to which the petition relates occurred prior to the dates on which ERISA became effective as to employee benefit plans. As to existing plans, ERISA participation and vesting requirements were first effective for plan years beginning after December 31, 1975. ERISA §§201-11, 29 U.S.C. §§1051-61. Accordingly, a decision by this Court in this case would not be a precedent for future interpretations of ERISA. Moreover, there is no suggestion from the record that respondents would not have been in full compliance with the statute if it had been in effect.

Likewise, petitioners state that "the validity of Section 401(a) of the Internal Revenue Code may be involved" because respondents McGraw-Edison Company

claimed a deduction for its contributions under the profit-sharing plan maintained by it. (Petition p. 5.) Petitioners offer no reference to the record, nor is there any basis in the record, on which a determination can be made as to the income tax consequences of the transactions involved in this case. Whatever income tax issues petitioners are attempting to raise were never presented to the courts below for decision.

Petitioners suggest on the final page of their petition that there is "prevailing uncertainty" in the law concerning collectively bargained retirement benefits (Petition p. 12.). Petitioners cite two district court decisions as authority on this point. Those decisions obviously are not court of appeals decisions in conflict with the Third Circuit decision in this case. The "uncertainty" which petitioners suggest is nothing more than various courts interpreting different collectively bargained retirement plans in differing factual circumstances.

In essence, petitioners argue that events occurred in this case which under the terms of the governing plans and agreements require the relief which they seek. The District Court and Court of Appeals have rejected the interpretation of the plans and agreements which petitioners continue to put forth. This issue of contract interpretation simply is not a substantial federal question which should be decided by this Court.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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